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No. 00-1382

Supreme Court, U.S.
FILED
MAY 4 2001
OFFICE OF THE CLERK

In The Supreme Court of the United States

FRED D. COOK, JR. and JANE A. COOK,
Petitioners

v.

UNITED STATES OF AMERICA,
Respondent

On Petition For Writ Of Certiorari To The United States Court Of Appeals Federal Circuit

REPLY TO BRIEF IN OPPOSITION

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ARGUMENT

The Federal Circuit has decided a recurring issue of tax law that conflicts with the applicable decision of this Court of *Commissioner v. Schleier,* 515 U.S. 323 (1995) and with the reasoning of the 7th Circuit of *Pipitone v. United States,* 180 F. 3d 859 (7th Cir. 1999).

1. It is ironic that the facts of Petitioners' case are the exact opposites of the facts of cases cited by Respondent,[1] yet the lower courts ignore the facts of Petitioners' case and rule in favor of the government, denying Petitioners' claim for a tax refund.

The pertinent differences between the facts of Petitioners' case and the cited cases are:

a) Petitioner[2] had tort type causes of action which had accrued during her IBM employment, prior to the signing of her Covenant Not to Sue.

Because Petitioner had not assertively pursued these tort type claims, does not nullify their existence (Resp. Br. @ p. 3, pt. 2). The courts have opined that claims do not have to be formerly or assertively filed to establish the existence of an underlying tort type cause of

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1 *Abbott v. U.S.,* 231 F. 3d 889 2d Cir. 2000; *Abrahamsen v U.S.,* 228 F. 3d 1360 (Fed. Cir. 2000); *Gajda v. Commissioner,* 158 F. 3d 802 (5th Cir. 1998); *Lubert v. Commissioner,* 154 F. 3d 539 (5th Cir 1998).

2 Petitioner in the singular shall refer to the wife.

action.[3]

In the cited cases, of Respondent, plaintiffs had no record of tort type claims.

b) Petitioner has suffered permanent personal injuries and chronic sickness, as a direct result of her employment with IBM.

Again, in the aforementioned cited cases of Respondent, plaintiffs had no existing personal injuries or sicknesses prior to signing their Covenant Not to Sue.

Clearly IBM was offering the payment in exchange for Petitioner releasing IBM from all liability of her tort type claims and obtaining her agreement not to sue IBM for damages on account of her personal injuries and chronic sickness related to those claims. The intent of the program and the purpose of the General Release and Covenant Not to Sue are clearly stated in the the TP MHVTP Summary Plan Description. The influential factor as to what was the intent of the payment, was determined by Petitioner's personal employment circumstances.

c) IBM paid specific attention to the injuries of Petitioner (Resp. Br. @ p. 7), as her IBM medical charts were specifically reviewed for the program. If IBM had no intention of considering Petitioner's personal injuries and chronic sickness, what was the relevance of reviewing her IBM medical history charts?

The fact that her medical charts were reviewed

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3 *Ham v. Commissioner*, [Dec. 52, 189] 74 T.C.M., CCH 358, 282 (1999); *Pipitone v U.S.*, 1996 WL384164, *4 (7th Cir. (Ill))

for the TP MHVTP project office, substantiates Petitioners' claim that IBM was aware of her tort type cause of action and the resulting injuries and sickness. IBM's knowledge of the claims and resulting injuries and sickness has a positive impact in determining that the requisite intent of IBM's was for Petitioner's payment to be a settlement for damages on account of personal injuries and sickness, on the condition she would agree not to sue IBM. *Pipitone v. United. States.*, *1999* WL 384164, *4 (7th Cir. (Ill.)); citing *Keel v. Commissioner*, 73 T.C.M. (CCH) 3095 (1999)

In the circumstances surrounding plaintiffs of Respondent's cited cases, the employers had no knowledge of plaintiffs' claims of personal injury or sickness resulting from their employment.

2. Based on the facts of Petitioners' case, Respondent errs, in asserting that the decision in *Pipitone v. U.S.*, supra, supports the decision of the court of appeals of Petitioners' case (Resp. Br. [FN 4]).

a) Petitioner's payment was not severance pay as the payment was in Pipitone, because her employment was not terminated at the time of her signing the General Release and Covenant Not to Sue. Petitioner was still considered to be an employee of IBM for an additional five years, after signing the Covenant.

b) Based on Petitioner's tort type cause of action, Petitioners' argued, that the payment, received from IBM, was for damages on account of personal injuries and sickness, in exchange, for releasing IBM from any liability

of Petitioner's tort type claims and agreeing not to sue IBM for these personal injuries and sickness based on those claims.

In Pipitone, no recorded tort type claims existed. Hence, the facts of Petitioners' case are the opposites of those facts of Pipitone. It would thus follow, that based on the facts of Petitioners' case, there is a conflict in the reasoning Of the Federal Circuit of Petitioners' case v. the reasoning of the 7th Circuit, based on the facts of the Pipitone case. This would logically dictate that the decisions of the two cases should not be the same. There in lies the conflict.

3. The fact that Petitioners stipulated that neither Petitioner's manager nor any IBM official (including CEO or any other executive officer) ever stated to Petitioner that her payment was made in settlement of tort type claims on account of personal injury or sickness, is irrelevant. No manager or IBM official ever said the payment wasn't for such claims (Resp. Br. @ p. 2).

Regardless, Petitioner was restricted by her Covenant, not to rely "on any representations, promises, or agreements of any kind made to [her] in connection with [her] decision to accept the TP MHVTP except those set forth in the TP MHVTP Summary Plan Description and other official plan documentation." (Pet. App. @ pt. 4, p. 4d)

Therefore whatever statements managers or IBM officials made outside the context of the TP MHVTP Summary Plan Description and official plan documentation, were not to be considered by Petitioner. Likewise, the lower courts should not

have considered such statements, of an IBM executive, that were contradictory to what was written within that documentation. His statements should not nullify what was clearly written within the TP MHVTP Summary Plan Description and official plan documentation.

Agreements are supposed to eliminate such after the fact misleading statements, such as those that were made by the IBM executive.

It is not standard practice to validate contradictory statements made by individuals about an agreement and ignore the text of that agreement. However, this is exactly what the lower courts had to do, in order to arrive at a decision of Petitioners' case, that would be consistent with the decisions of the other IBM Individual Transition Option (ITO) cases, even though the facts of Petitioners' case were the opposites of the facts of the other IBM ITO cases cited by Respondent.

4. The decision of the court of appeals conflicts with the decision of this Court of *Commissioner v. Schleier*, supra, as Petitioner had tort like claims and resulting personal injuries and chronic sickness. One of IBM's intents was for the payment to be the settlement of such tort type claims (Pet. App. @ p. 3d). The payment received by Petitioner from IBM was damages received by agreement, on account of her personal injuries and her chronic sickness. She agreed that in exchange for the sum of her payment, she would "never institute a claim of any kind against IBM, or those associated with IBM, including but not limited to

claims related to [her] employment", as stated in her personalized General Release and Covenant Not to Sue.

The facts of Petitioners' case meet the two pronged requirements of *Commissioner v. Schleier,* supra.

CONCLUSION

For the reasons set forth in this Reply and Petitioners' Writ of Certiorari, Petitioners request that their Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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May 2000